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Executive Registry

17-9815/1

20 October 1977

3141

MEMORANDUM FOR: Director of Central Intelligence

FROM: Anthony A. Lapham
General Counsel

SUBJECT: Ellsberg v. Mitchell; As Between the DCI and
the Secretary of Defense, Who Should Assert
Claims of Privilege with Respect to NSA Documents

1. Action Requested: None. The attached correspondence is for your information only.

2. Background: As you know, there has been a bit of a scrap between this Office and the Office of General Counsel of DOD over the question of who should execute affidavits in support of privilege claims relating to NSA documents. The candidates for this honor are you and the Secretary of Defense, and in my view the latter is the appropriate affiant. Deanne Siemer disagrees. The attached correspondence amplifies the issue.

[Redacted Signature Box]

Anthony A. Lapham

25X1

Attachments

OGC: AAL: sin

Original - Addressee

- 1 - Acting DDCI
- 1 - ER via Ex Secty ✓
- 1 - OGC

EXECUTIVE REGISTRY FILE

Justice

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OGC Has Reviewed

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[Redacted Signature Box]

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Washington, D.C. 20505

OGC 77-6583

17 October 1977

Ms. Deanne Siemer
General Counsel
Department of Defense
Washington, D.C. 20301

Dear Deanne:

Re: Ellsberg v. Mitchell
(DDC) Civ. No. 1879-73

The Director has asked me to respond to your letter of 8 October, which was received by this Office on 12 October, concerning the Ellsberg case.

25X1 To begin with, there are a few factual points that appear to require clarification. On 2 June 1977, [] an attorney in this Office, wrote to [] the 25X1 NSA General Counsel, forwarding to him a listing of the NSA documents possessed by CIA which indicated that any communications to or from any of the plaintiffs may have been overheard in the course of NSA electronic surveillance. The document listing was forwarded to NSA pursuant to a request by the Department of Justice. Among the documents listed were the four documents to which your letter to the Director evidently refers.

25X1 After searching its record systems, NSA was able to locate the bulk of the documents listed. However, the four documents in question could not be found, and as explained in the letter by [] of your office to Bob Keuch of the Department of Justice dated 26 August 1977, CIA was so informed on 26 July 1977. CIA was asked to furnish NSA with copies of the missing documents, and [] responded on 16 August 1977 by sending copies of the documents requested to [] of the NSA Office of General Counsel. 25X1

25X1 It seems clear that in the wake of the June mailing to [] NSA was aware of the fact the documents in question did exist. It seems equally clear that NSA came into possession of the documents in question as a result of the August mailing to [] Therefore, it is inaccurate to state that the Department of Defense was unaware of the existence of the documents on 13 August 1977 when the Secretary of Defense executed his affidavit claiming privilege. It is likewise inaccurate to state that NSA does not now have copies of the documents in question, which CIA supplied two months ago at NSA's request. 25X1

25X1

Turning to the legal issue, I take it that the general principles governing state secret privilege claims are not in dispute. The claim of privilege must be asserted by the head of the department or agency "which has control over the matter" (Reynolds v. U.S., 345 U.S. 1, 8) and which is "responsible for the records" (Kinoy v. Mitchell 67 FRD 1, 8), after personal consideration by that official of the material sought. Our difference has to do with the proper application of these principles. [] argued in his 26 August letter to Mr. Keuch that the Director was the proper claimant with respect to the documents in question because, "the NSA records are in the sole custody of CIA." Putting aside the fact that CIA did not have sole custody of the documents on 26 August, copies having been furnished to NSA on 16 August at NSA's request, it can hardly be the case that the head of an agency to which a document happens to have been disseminated becomes the proper privilege claimant simply because the originating agency has lost or mislaid that document. Certainly nothing in Reynolds or Kinoy suggests that accidental circumstances of that kind should determine whether and by whom the state secret privilege is to be invoked. Moreover, without personal knowledge and consideration of all the circumstances surrounding the interceptions reflected in the NSA documents, the Director would not at this time be in a position to assert privilege with respect to the NSA documents even if he were the proper agency head to do so.

Accordingly, in my judgment the Secretary of Defense, not the Director, is the appropriate authority so far as concerns an assertion of privilege covering the documents in question, and as I understand it the Department of Justice concurs in that judgment. That is not to say, of course, that these documents should be left unprotected. On the contrary, in line with the Director's responsibility to protect intelligence sources and methods, I would urge that a claim of privilege be submitted if proper grounds for such a claim exist in the opinion of the Department of Defense and Department of Justice.

Best regards,

[]

Anthony A. Lapham
General Counsel

cc: Assistant Attorney General
Criminal Division

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WASHINGTON, D. C. 20301

October 8, 1977

Admiral Stansfield Turner
Director of Central Intelligence
Washington, D. C. 20505

Re: Ellsberg v. Mitchell
(D.D.C.) Civ. No. 1879-73

Dear Admiral Turner:

There appears to be a minor problem in the Ellsberg case that needs to be resolved expeditiously. NSA searched its files pursuant to a Department of Justice request and turned up all messages in its possession relevant to this litigation. On August 13, 1977 the Secretary of Defense executed an affidavit claiming privilege with respect to these documents.

I am told that shortly thereafter CIA discovered four additional NSA documents relevant to this litigation. NSA no longer has these documents in its files and was unaware of their existence when the Brown affidavit was filed. I am also told that you have determined that you cannot make a claim of privilege for these documents and therefore no affidavit will be filed to cover them.

If you believe that the documents do not contain any information on sources and methods that would cause harm to the government if disclosed, then the documents should not be protected by a claim of privilege. If they do contain information that should be protected, we need to have a short affidavit to that effect that can be filed with the Brown affidavit. I have previously provided Tony Lapham with a draft.

Sincerely,

Deanne C. Siemer

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

October 8, 1977

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Director of Central Intelligence
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Deanne C. Siemer

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